

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

SEARS, ROEBUCK AND CO.

Employer¹

and

Case No. 29-RC-11344

LOCAL 30, INTERNATIONAL UNION
OF OPERATING ENGINEERS, AFL-CIO

Petitioner²

DECISION AND DIRECTION OF ELECTION

Sears, Roebuck and Co. (“the Employer” or “Sears”) operates department stores and service operations, including a facility located at 283 Platinum Avenue in Staten Island, New York. On June 6, 2006, Local 30, International Union of Operating Engineers, AFL-CIO (“the Petitioner”) filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of approximately five (5) facilities maintenance engineers (“FMEs”) who work at the Employer’s Staten Island facility. The Employer contends that the petitioned-for unit of FMEs is inappropriate for bargaining, and that the only appropriate unit would be a storewide unit including all hourly employees at the Staten Island store.

A hearing was held before Eric Boerschinger, a hearing officer of the National Labor Relations Board. In support of its position on the bargaining unit issue, the

¹ The Employer’s name appears as amended at the hearing.

² The Petitioner’s name appears as amended at the hearing.

Employer called two witnesses to testify: Patrick Moccia (store general manager) and Santos Gonzalez (assistant store manager for operations). In support of its position regarding the appropriateness of the unit, the Petitioner called FME Frank Vigilante, Jr. to testify.

After considering the entire record, I conclude that the petitioned-for unit limited to facilities maintenance engineers is appropriate for the purposes of collective bargaining. Accordingly, I will direct an election below in that unit.

FACTS

Store general manager Patrick Moccia testified that the Staten Island facility employs more than 320 hourly employees, plus several managers and lead persons. There is no history of collective bargaining at that facility.

Facilities maintenance engineers

There appears to be no dispute that facilities maintenance engineers' duties include operating, maintaining and repairing the facility's heat, ventilation and air conditioning (HVAC) system, as well as some non-skilled maintenance work. Their job description (Er. Ex. 7)³ includes HVAC functions, as well as equipment maintenance, electronic, electrical and plumbing work. As described below in more detail, the witnesses gave different estimates as to the proportion spent on each type of work.

There is no dispute that the FMEs are legally required to have certain licenses and certificates in order to operate the HVAC system, including a refrigeration engineer's license and a boiler operator's certificate from the New York City (NYC) Fire Department, a United States Environmental Protection Agency (EPA) "universal

technician” certification, and a “master fire suppression piping contractor” license from the NYC Department of Buildings. According to FME Frank Vigilante, certain asbestos-related certificates may be required for the job, such as his EPA-approved asbestos certificate and his NYC asbestos handler certificate. Vigilante did not recall if Sears specifically requires the asbestos certificates but he explained that, generally, power houses have asbestos, and the engineers who work with them need to know how to contain the asbestos safely if it is accidentally released into the air or ventilation system.

The Employer is legally required to have a licensed engineer on duty any time the HVAC system is operating. At the Staten Island store, the five FMEs all work part-time. They collectively cover 56 to 58 of the total hours per week that the store is open. The Employer covers some additional shifts three days per week via a subcontractor called Guardian.⁴ The FMEs employed by Sears report to the assistant store manager (ASM) for operations, Santos Gonzalez, whereas the engineers employed by Guardian report to Guardian’s president, Chris DeLeon. No other Sears employees may operate the HVAC system since they do not have the required licensed and certifications.

The HVAC system does not run at night, after the store closes. Thus, one duty of the FME working each morning is to start up the system. Gonzalez testified that FMEs must thereafter check the HVAC system every two hours, and must shut it down when the store closes. Each inspection takes about 30 minutes. They also maintain and repair the HVAC systems on a regular basis, such as changing filters. FMEs keep a log book,

³ References to exhibits in the record are herein abbreviated as follows: “Er. Ex. #” refers to Employer exhibit numbers.

⁴ Specifically, the FMEs employed by Sears cover all day and evening on Sundays (9:00 a.m. to 7:00 p.m.), all day and evening on Mondays, Wednesdays and Fridays (9:00 a.m. to 9:30 p.m.) and Tuesday and Thursday evenings (4:00 p.m. to 9:30 p.m.). The engineers employed by Guardian cover Tuesday days, Thursday days and all of Saturdays.

where they note any relevant information about the HVAC systems.⁵ FME Vigilante, who works in the evenings on Monday and Wednesday, testified that he starts the evening shift by getting the “low down” from the previous shift’s engineer, logging into the log book, and then starting his rounds.

FMEs report to Operations ASM Gonzalez, who also supervises preventive maintenance technicians (PMTs), receiving associates, “return to vendor” associates, cashiers and office assistants. FMEs and PMTs report directly to Gonzalez, whereas receiving associates, return to vendor associates, cashiers and office assistants have intermediary lead persons in their respective departments. (Supervision of classifications in other departments is described below.) There is also a district quality maintenance manager, Bob Borodin, who oversees maintenance for 13 stores in two districts. Witnesses differed as to whether he also supervises the FMEs. Both Employer witnesses denied that Borodin supervises the FMEs in any way, but Vigilante claimed that Borodin sometimes comes into the engineers’ shop and leaves work assignments for the FMEs.

It appears that FMEs’ work consists of a combination of daily HVAC routines (which they do automatically, without a supervisor having to “assign” it), and other specific maintenance tasks as needed. There is no dispute that Gonzalez, as their immediate supervisor, gives them specific maintenance assignments. Gonzalez stated

⁵ For example, the log book for May 28, 2006 stated the following: “8 AM/5 PM. Made rounds in store at start of shift. Store found to be very warm. Started AC unit. Open HR 18185. Start counter 2238. Status check indicated excess refrigerant charge. Reported situation to Santos. He will follow up. 3 HVAC fans in service with damper selection closed. C.W. [chiller water] set point 48 degrees at start up. Lit off domestic hot water heater. Ribbon change for Karen in lawn and garden [department]. Lowered C.W. setting at 3:45 AM [sic?] to 45 degrees as per Santos re stop. NOTE: Please before start up, check damper position. Appliance area kept complaining about AC (too warm). Routine maintenance and housekeeping performed. Must meet with Santos to discuss coverage voids and proper operating

that he may tell the FMEs, for example, to replace a ceiling tile or to fix a cash register. Sometimes, if there is a backlog of maintenance tasks, Gonzalez gives a written “to do” list to the FMEs (for example, see Er. Ex. 9(a) and (b)). Vigilante testified that if someone has a problem, such as the store being too hot or too cold, the person would usually contact Gonzalez, who would then make an assignment to the FME on duty. Sometimes, if a FME notices an emergency situation in the store, he may act on it immediately, without waiting for an assignment from Gonzalez. Both Moccia and Gonzalez testified that other managers may also ask the FMEs to perform a maintenance task, for example, if Gonzalez is not in the building at that time.

As noted above, the parties dispute *how much* of their time FMEs spend doing their specialized HVAC work. Vigilante testified that his primary function is to operate and maintain the HVAC system, and that he does light maintenance work only “occasionally,” i.e., one or two hours per month. On cross examination, Vigilante was confronted with pages from the engineers’ maintenance log book (Er. Ex. 10(b)), indicating that on May 7, 2006, he painted a wall, repaired a register, installed another register, brought a table to the parking lot, and changed a light in the lunchroom, in addition to the HVAC work. Vigilante responded that that day was unusual, including the fact that he worked an 18-hour shift. In another log entry for June 4, 2006 (Er. Ex. 10(e)), he spent two hours trying to fix a problem with an office computer, and called an elevator contractor to repair the freight elevator.

Employer witness Moccia estimated that the FMEs spend only 50% to 60% of their work time on HVAC work, and 40% to 50% on general maintenance, including

procedures. Secured AC unit at 4:45 AM [sic?] leaving damper closed with 1 house fan on for remaining

replacing light bulbs, replacing floor tiles and ceiling tiles, and minor repair work (patching, painting, electrical, plumbing). Likewise, Gonzalez stated that FMEs spend 40% to 50% percent of their time on general maintenance. On cross examination, Gonzalez initially denied that HVAC work is the FMEs' "primary" duty, although he later conceded that HVAC is their primary work during "the season", i.e., when the hot or cold weather requires running the chillers or boiler, respectively.

Another point of dispute is the extent to which other employees may help the FMEs. Gonzalez testified that, on two occasions, he saw an associate from the receiving department help an FME, for example, with moving a register. On another occasion, Gonzalez testified that an FME requested someone from receiving to help him change a filter in the HVAC system, although the request was later rescinded when the FME was able to do it himself. However, FME Vigilante testified that he would never, and has never, asked anyone for help other than another mechanically-trained engineer.

FMEs have an engineers' office (also called their "shop"), located on the store's upper level, in the back right corner away from the customer entrances. FMEs store tools and supplies such as ceiling tiles there. Vigilante testified that FMEs have lockers in their shop. He does not use the large locker room, which other employees use and which Gonzalez said that FMEs use. Similarly, Vigilante testified that FMEs take their breaks in the engineers' room, whereas Gonzalez testified that he sees FMEs using the common break room which other employees also use. Vigilante stated that only the FMEs and their supervisor Gonzalez use the engineers' office. He never sees sales

shift and overnight" (Employer Exhibit 10(d)).

employees in there, although occasionally a Quality Maintenance Technician (“QMT,” described in more detail below) comes in to borrow a tool.

Gonzalez explained that the HVAC units are on the roof of the building and the main tower. FMEs use a stairway, near the mechanical room on the store’s upper floor, to access the HVAC units. There seems to be no dispute that FMEs spend their time at the HVAC units or in the engineers’ office, when they are not performing other maintenance tasks around the store.

The parties differed somewhat over the extent of interaction between FMEs and other employees inside the store. Moccia testified that any employee could call a FME directly if he or she noticed a “maintenance issue” in the store, and that he is “sure” FMEs interact with other employees when they do maintenance around the store. By contrast, although Vigilante agreed that any employee who sees “an emergent situation” could tell him about it directly, he generally does not interact with the sales associates and other employees in the store. There is no evidence that FMEs interact with any other employees when they (FMEs) do HVAC work on the roof and tower. Furthermore, there is no evidence that FMEs and other employees ever substitute for each other.

All five FMEs employed by Sears work part-time. For example, Vigilante works Monday and Wednesday evenings, 4:30 p.m. to 9:30 p.m., plus a double shift (9:00 a.m. to 7:00 p.m.) every other Sunday. There is usually only one FME on duty at a time, although Vigilante stated that two FMEs sometimes work on special projects together on a Saturday.

Only the employees who have contact with the public, such as sales employees, must follow the Employer’s dress code (black or beige pants, black or white tops).

There is no dispute that the FMEs do not follow the dress code. Likewise, the receiving associates, “return to vendor” associates, loss prevention associates and preventive maintenance technicians (described below) do not follow the dress code. Vigilante testified that FMEs generally wear “work clothes,” but there is no uniform.

FMEs earn between \$19 and \$25 per hour. They, along with the automotive mechanics, are the highest hourly-paid workers in the store.

Other departments and job classifications

As noted above, the Employer contends that the only appropriate bargaining unit is a storewide unit, encompassing all hourly employees at the Staten Island store.

General manager Moccia described all the departments and classifications, who report to a total of 8 managers under him. The parties stipulated that the assistant store managers (ASMs) are supervisors as defined in Section 2(11) of the Act, and therefore should be excluded from any unit found appropriate herein.

Operations department

Assistant store manager for operations, Gonzalez, who directly supervises the five FMEs, also supervises five (5) human resource office assistants and the human resources lead;⁶ 44 cashiers and a cashier lead; 22 receiving associates, one “return to vendor” associate and a receiving lead; and three (3) preventive maintenance technicians (PMTs). Of these, Moccia described the PMTs in most detail, because of some overlap in maintenance functions with the FMEs.

⁶ The parties stipulated to exclude human resources lead Liz Venier from the unit as a confidential employee.

According to Moccia and Gonzalez, the three **PMTs**⁷ duties include repairing merchandise for re-sale, repairing displays on the sales floor, assembling barbeque grills for display, and helping with general maintenance such as light patching, painting, cash register repairs, and replacing lightbulbs and tiles. (*See also* Er. Ex. 11, PMT job description.) Moccia estimated that PMTs spend about 75% of their work time repairing merchandise. They do not work on the HVAC system. It appears from Gonzalez's testimony that one PMT works full-time, another works part-time, and the third is scheduled "as needed." Moccia stated that there is no coordination of scheduling between the FMEs and PMTs. Gonzalez testified that, on some weekday nights when no PMT is on duty and the store needs general maintenance, an FME is available to do it. PMTs earn in the "low teens" to \$16 per hour, according to Moccia.

FME Vigilante testified that he has no contact with the PMTs, and does not even know who they are. He stated that PMTs do not use the engineers' office.

The 44 **cashiers** report to a cashier lead, who reports to Gonzalez. They are responsible for completing customers' purchases, as well as processing returns and exchanges, special-ordering merchandise, promoting Sears' credit products, and sometimes assisting with sales floor "readiness." They earn between \$6.75 and \$8.00 per hour.

The five **human resource office assistants**⁷ report to the human resources lead, who reports to Gonzalez. It appears from the store plan (Er. Ex. 8) that they work near Gonzalez's office, which is also near the employee entrance and the computer which

⁷ The Petitioner contends that the HR assistants should be excluded in any event because they are confidential and/or managerial employees. Given my conclusion that the petitioned-for unit limited to FMEs is appropriate, the status of HR associates need not be determined.

many employees use to “clock in” and “clock out.” They perform human resource clerical functions, as well as cash office activities, account maintenance, data entry, mail sorting and ordering supplies. The record does not indicate their wage rate.

The 22 **receiving associates** report to the receiving lead, who reports to Gonzalez. It appears that they work in the loading and receiving areas, in the back left corner of the facility. They are responsible for merchandise pick-up, unloading new merchandise from trucks, merchandise preparation and staging, and outbound shipments. Receiving associates earn between \$7 and \$10 per hour.

There is also one **return to vendor associate**, who also reports to the receiving lead. The RTV associate processes items that are returned to Sears and cannot be resold. He gathers and verifies certain information, and packs and ships the items to return for credit. He earns between \$8 and \$11 per hour.

Loss prevention department

14 **loss prevention associates** report to the loss prevention manager (John Velez) who, in turn, reports to store general manager Moccia. They use security cameras and other means to help handle shortage control, “internal dishonesty,” shoplift prevention, and detention and safety. They earn between \$8 and \$11 per hour.

Brand central department

“Brand central” refers to the sale of appliances, electronics and vacuums. There are 58 **brand central consultative selling associates** (sales employees) who report to the Brand Central ASM Tony Antonucci, who reports to Moccia. Obviously, they work in the brand central area of the retail sales floor. Moccia explained that, in this department, associates’ compensation is based entirely on commission, with no base

pay. When the store calculates the hourly equivalent (total pay, divided by the number of hours worked) for benefits purposes, the brand central sales employees usually range between the “mid teens” and \$32/hour.

Home improvement department

Home improvement includes the sale of hardware, sporting goods, lawn and garden, paint, and home environmental products. The 22 **home improvement consultative associates** report to home improvement ASM Ivan Abelancio, who reports to Moccia. Moccia testified that they are paid by commission, the hourly equivalent usually ranging from the “low-to-mid teens” up to \$26 per hour. There are also 11 **tool consultants** who sell both hardware and paint, and who earn between \$8 and \$10 per hour.

Softlines department

The softline department sells clothes, shoes, jewelry, fragrances, home fashions and mattresses. It appears that the sales force includes 11 **jewelry consultative selling associates** (whose base pay plus commission is equivalent to \$9 to \$18 per hour), 13 **footwear consultative selling associates** (whose base pay plus commission is equivalent to \$9 to \$15 per hour), 6 **fragrance consultative selling associates** (who earn between \$6.75 and \$8.00 per hour), and 6 **mattress consultative selling associates** (who earn “in the low teens”). They report to two softline ASMs, Claire Makovich and Vicky Stager.

There are also 53 **merchandise customer assist associates**, who work in the brand central, home improvement and softline departments. Their primary function is to stock the sales floor, including replenishing the merchandise, creating “out of stocks,”

and doing set-ups and advertisements. It appears that they report to merchandising leads within their department, who report to the ASM for the department. They earn between \$6.75 and \$9.00 per hour.

In-store support

There are 13 **in-store support associates**, who report to the in-store support lead, who in turn reports to the in-store support ASM, Kathy Greco. This department works with other departments to create and market special events and promotions, signs, advertisements, price changes and “re-sets” (not explained). The in-store support associates earn between \$7.00 and \$9.00 per hour.

Automotive

This department sells automotive products and services, and is managed by automotive manager Joe Seth. It employs 15 **automotive customer service assistants** who help the customers and takes their orders. It also employs 25 **automotive technicians** or mechanics who install tires and batteries, and perform auto repair and maintenance. The mechanics have automotive service excellence (ASE) certifications at various levels. Moccia stated that both automotive classifications earn “from the mid-teens to the mid-twenties.”

Quality maintenance department

This department is not based in the Staten Island store, and the parties agreed to exclude **quality maintenance technicians** (QMTs) from any bargaining unit found appropriate herein. Nevertheless, since QMTs were mentioned in various connections with maintenance work, they are described briefly below.

QMTs travel to various stores within a district, repairing registers and performing general maintenance tasks. Moccia testified that they do some maintenance on the HVAC system, although they are not licensed to operate it. There is one QMT who comes to the Staten Island store, as well as two other stores. QMTs report to district quality maintenance manager Bob Borodin, who supervises a total of 13 stores in two districts.

There seems to be no dispute that the QMT uses the engineers' office to some extent when he works at the Staten Island facility. Vigilante testified that he knew one QMT (Bill, last name unknown), who sometimes comes to the shop to borrow a tool.

Personnel policies and other information

Moccia testified that the Employer's personnel policies and procedures apply equally to all the employees, including the FMEs. According to Moccia, all new employees undergo the same hiring procedure and orientation. They all receive the same employee handbook (Er. Ex. 4), and get an annual review. By contrast, FME Vigilante testified that he has never seen the employee handbook before, never went through any orientation, and has never gotten an annual review in his 7 years of working for Sears.

All employees are subject to the same disciplinary process. Although the assistant store managers have input, Moccia stated that he ultimately must approve all evaluations, performance improvement plans and disciplinary measures. Another form of common supervision is that all ASMs and leads take turns (two hours per shift) acting as the "customer experience manager" or the "manager on duty." In that capacity, they make rounds in the whole store, making sure that everything is being done properly.

They also act as the store general manager when Moccia is not there. If an ASM from one department sees a problem in another department, he or she has authority to correct it. For example, Gonzalez testified that one time when he was working as the customer experience manager or manager on duty, he noticed that a brand central sales associate was repeatedly charging the wrong prices, so he took her aside to “coach” her about the Employer’s “pricing pledge.”

There is no dispute that all employees use the same employee entrance. Most employees use a computer near the entrance to clock in and clock out, although they could use other computers elsewhere in the store. As mentioned above, there is some dispute as to whether FMEs use the same break room and locker room as other employees.

All employees are paid every two weeks.

Most employees at the Staten Island facility work part-time, including the FMEs. Moccia testified that only 22% of the employees work full-time. As for benefits, part-time employees are eligible for an “associate discount” on Sears merchandise, reduced-rate educational loans, and reduced rates at K-Mart pharmacies. Part-time employees must work at least 1,000 hours before they are eligible for paid vacation time. Employees may get some paid holidays, if they worked a certain number of hours (unspecified) before the holiday. Vigilante acknowledged that he is eligible for the employee discount, but he denied getting any other benefits. He stated that he does not work enough hours to qualify for a paid holiday.

DISCUSSION

It is well established that a certifiable bargaining unit need only be an appropriate unit, not the most appropriate unit. Morand Bros. Beverage Co., 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951); Omni-Dunfey Hotels, Inc., d/b/a Omni International Hotel of Detroit, 283 NLRB 475 (1987); P.J. Dick Contracting, 290 NLRB 150 (1988); Dezcon, Inc., 295 NLRB 109 (1989). The Board's task, therefore, is to determine whether the petitioned-for unit is an appropriate unit, even though it may not be the only appropriate unit or the "ultimate" unit. The Board has stated that, in making unit determinations, it looks "first to the unit sought by the petitioner. If it is appropriate, our inquiry ends. If, however, it is inappropriate, the Board will scrutinize the employer's proposal." Dezcon, Inc., *supra*, 295 NLRB at 111. Thus, the unit requested by a petitioning union is the starting point for any unit determination. In assessing the appropriateness of any proposed unit, the Board considers such community-of-interest factors as employee skills and functions, degree of functional integration, interchangeability and contact among employees, and whether the employees have common supervision, work sites, and other working terms and conditions.

The Board has specifically held that skilled maintenance engineers may constitute an appropriate bargaining unit, separate from other retail store employees. In Macy's West, Inc., 327 NLRB 1222 (1999), the Board noted that maintenance engineers possessed unique mechanical skills (including HVAC skills), earned higher wages than the other hourly employees, were separately supervised by the maintenance manager, and did not interchange or substitute with other employees. Furthermore, although

maintenance engineers had “some overlapping functions (such as lamping)” with other employees, the Board found this fact “not determinative” Id. at 1223.

Similarly, in Omni-Dunfey Hotels, Inc., d/b/a Omni International Hotel of Detroit, 283 NLRB 475 (1987), the Board found a separate unit of engineering employees appropriate, rejecting the employer’s contention that the only appropriate unit must include *all* employees of the hotel. Here again, as in Macy’s, supra, the Board noted the engineering employees’ unique skills, high hourly wage, separate supervision, lack of transfers in or out of the engineering department, and only minimal overlap with the other employees. The Board particularly noted that the engineering employees’ day-to-day supervision by the chief engineer had “greater bearing” on their interests than something general like common hiring procedures. Specifically, the fact that engineering employees “work under the direction of, and would likely address their immediate grievances to, someone different from those under whom other employees immediately work” has greater bearing on their potential collective bargaining interests. Id. at fn. 1. Finally, the Board stated that other factors -- sharing common fringe benefits, punching the same time clock and sharing common overall supervision -- failed to prove that a separate engineering employees’ unit would be inappropriate. Id. at 476. Thus, in Omni-Dunfey, the Board put more emphasis on employees’ immediate, day-to-day supervision (e.g., a departmental manager) than on common supervision at higher levels (e.g., a general manager).

Bearing these principles in mind, I find that the petitioned-for unit of facilities maintenance engineers constitutes an appropriate bargaining unit.

It is undisputed that FMEs are skilled maintenance employees, possessing unique skills, licenses and certifications which enable them to perform specialized HVAC work. Although they also perform some general maintenance work -- which overlaps with the preventive maintenance technicians to some extent -- they spend most of their time performing the skilled HVAC work. Even the Employer's witnesses admitted that FMEs spend at least 50% of their time on HVAC work, and that this is their "primary" work during the seasons when the chillers or boilers are operating. The fact that FMEs share some duties with the PMTs does not erase that fact the skilled HVAC work is their unique and primary function.

Because of their unique skills, the FMEs are the highest-paid hourly employees at Sears (up to \$25 per hour). Although some employees (e.g., brand central sales employees) who are paid by commission may earn the *equivalent* of up to \$32 per hour, their compensation relies on an entirely different commission-based structure which, if anything, tends to show a disparity of interest with the FMEs. See Omni-Dunfey, *supra*, at fn. 2 (engineers' hourly rate shows separate community of interest than other employees who receive tips). The only comparable hourly rate within the Employer's facility is the automotive service technicians, who earn up to the "mid-twenties" per hour, based on their unique mechanical skills and certifications. Yet even this does not mandate the FMEs' inclusion in a storewide bargaining unit, where the vast majority of non-sales, hourly employees (merchandise and customer assist, loss prevention, in-store support, receiving and cashiers) earn only half the FMEs' hourly rate.

Another consequence of the FMEs' uniquely skilled function is that no other employees in the storewide unit proposed by the Employer substitute for the FMEs, and

there is no evidence of transferring employees between skilled maintenance and the other departments. This fact supports a finding of a separate appropriate unit, as it did in Macy's and Omni-Dunfey, *supra*. Furthermore, that FMEs' general maintenance functions overlap somewhat with the PMTs (who spend 75% of their time repairing merchandise) is not determinative. Macy's, 327 NLRB at 1223. Even though Gonzalez supervises the FMEs and PMTs directly (as well as four other classifications and their lead persons), he admitted that there is no coordination of scheduling between those two groups, and that the PMTs do not substitute for FMEs. Vigilante also testified that he does not even know who the PMTs are, and that he has never seen them use the engineering office. Thus, the mere fact that both FMEs and PMTs may replace light bulbs and tiles does not show a substantial community of interests and, in any event, does not mandate a storewide unit.

It is true, as the Employer points out, that the FMEs' immediate supervisor, Santos Gonzalez, also supervises other employees in the operations department (including PMTs, human resource office assistants, cashiers, receiving associates, and a "return to vendor" associate). While that fact might arguably support the appropriateness of an *operations department* bargaining unit, it does not support the Employer's claim mandating a *storewide* unit. Gonzalez does not supervise the entire store, and the fact that store general manager Moccia provides some common supervision at a higher level, or that the other ASMs share some storewide supervisory duties, has less bearing than the FMEs' day-to-day supervision by Gonzalez. Omni-Dunfey, *supra*, at fn 1. Furthermore, that employees may share some common benefits, or that they use the same employee entrance, does not prove that the petitioned-for unit is inappropriate. Id. at 476. Finally,

Vigilante disputed the extent to which personnel policies are applied on a storewide basis, for example, by testifying that he has never received an annual review in his seven years at Sears. In any event, even if personnel policies were applied to all employees storewide, that would not outweigh the many other factors which show a separate community of interest for FMEs.

Finally, it should be noted that FMEs do not follow the same dress code as the sales employees, who have more contact with customers. FMEs also spend a significant amount of time in areas (specifically at the HVAC units, and in the engineering office) where other employees do not go, and spend a smaller amount of time performing maintenance in areas where other employees go, i.e., the sales floor.

Based on the foregoing, I conclude that the petitioned-for FMEs share a sufficiently distinct community of interest from other store employees to constitute *an* appropriate bargaining unit. I particularly note their unique skills and licensing requirements, their distinct functions in repairing and operating the HVAC system, that no other store employees substitute for the FMEs, their separate immediate supervision (at least, separate from store employees outside the operations department), their lack of substantial interchange with other store employees, the differences in their wages, and their different work sites. By contrast, the Employer's evidence has not demonstrated such a close community of interest among all the store's employees to render the petitioned-for unit inappropriate. I also note that there is no collective bargaining history on a storewide basis here, and no other union currently seeking to represent the FMEs as part of a broader, storewide unit.

Accordingly, I hereby find that the petitioned-for unit of facilities maintenance engineers constitutes an appropriate unit for the purposes of collective bargaining. I will therefore direct an election in that unit below.

CONCLUSIONS AND FINDINGS

Based on the entire record⁸ in this proceeding, including the parties' stipulations and in accordance with the discussion above, I conclude and find as follow:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that Sears, Roebuck and Co. is a domestic corporation, engaged in operating retail stores and service operations throughout the United States, including the facility located at 283 Platinum Avenue, Staten Island, New York. During the past 12 months, which period is representative of its annual operations generally, the Employer derived gross revenues in excess of \$500,000, and purchased and received at its Staten Island facility goods valued in excess of \$5,000 directly from entities located outside the State of New York.

Based on the parties' stipulation, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner, a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer, within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

⁸ The undersigned Regional Director hereby amends the transcript *sua sponte* as indicated in the Appendix attached hereto. It should be noted that the record does not include various collective bargaining agreement excerpts which the Petitioner's non-attorney organizer attached to the post-hearing brief. Such agreements were not introduced into evidence during the hearing, and may not properly be considered as evidence after the fact.

5. Based on the foregoing discussion, I find that following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time facilities maintenance engineers (FMEs) employed by the Employer at its facility located at 283 Platinum Avenue, Staten Island, New York, but excluding all other employees, sales employees, human resources lead and employees, confidential employees, managerial employees, assistant store managers, quality maintenance technicians (QMTs), guards and supervisors as defined in the National Labor Relations Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be

represented for collective bargaining purposes by Local 30, International Union of Operating Engineers, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before **August 2, 2006**. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. Club

Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by **August 9, 2006**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: www.nlrb.gov.

Dated: July 26, 2006.

/S/ ALVIN BLYER

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

APPENDIX

The transcript is hereby amended as follows:

Page 3, line 9 (index): Witness' name was "Frank Vigilante", not "Victor Igilante".

Page 9, line 11: facilities "maintenance," not "made and an".

Page 13, line 19: Witness' name is "Patrick Moccia," not "Daniel John Smith."

Page 68, line 19: "PMT [preventive maintenance technician]" rather than "PRT".

Page 128, line 11: "and RTV[return to vendor]," rather than "NRTV".

Page 150, line 25: "started" rather than "shut off".